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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

SARAH LINDA PARKER, *et al.*,
*Petitioners,*

*vs.*

JUDITH K. ANDERSON, and
BELL HELICOPTER COMPANY, *et al.*,
*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. In pursuing a Title VII class action settlement, do class attorneys who simultaneously negotiate both the terms of class relief and payment of their own attorney's fees by creating one settlement fund to compensate both the class and themselves thereby engage in an unlawful and impermissible conflict of interest.

2. In pursuing a Title VII class action settlement, do class attorneys who fail to advise the class representatives of the terms being negotiated in settlement, who fail to permit the representatives any opportunity to propose the terms of relief most desired by and of most benefit to the class, who fail to properly assist the representatives in evaluating the need for or the merits and effect of the settlement, who fraudulently include a damaging provision in the final settlement without notice to and discussion with the representatives, who formally sign and approve the settlement without notice to the representatives, and who misrepresent and conceal the representatives' enormous opposition to the settlement at the time it is filed with the district court, thereby violate the duty to provide "fair and adequate representation" to members of the class, as required by Fed.R.Civ.P. 23 (a) (4).

## PARTIES

The following is a listing of all parties to the proceedings in the Court of Appeals, as required by Supreme Court Rule 21.1 (b):

1. Petitioners Sarah Linda Parker, Blanche W. Eberly, Curtis Ford, Peggy N. Haynes, Mary T. Jackson, Ernest Mackey, Albert Odum, Opal W. Randall, Nathaniel Rodgers and Dorothy Spears.

2. The Class:

> All Blacks, male and female, who were employed or who applied for employment at any Texas facility of Bell Helicopter Company at any time between November 26, 1972 and March 1, 1980; and
>
> All other Females, who were employed or who applied for employment at any Texas facility of Bell Helicopter Company at any time between November 2, 1973 and March 1, 1980.

3. Respondent Judith K. Anderson.

4. Respondent Bell Helicopter Company, a division of Textron, Inc.

5. Huey P.Mitchell, associate class attorney (an Appellant in the Court of Appeals.

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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Petitioners Sarah Linda Parker, et al., pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on February 18, 1982.

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[1]Petitioners Sarah Linda Parker, et al., comprise ten of the original eleven individuals appointed to represent the class in this cause. These ten individuals disapproved the class settlement filed in this case, and herein represent all persons in the class who oppose such settlement.

[2]Respondent Judith K. Anderson is the remaining individual originally appointed to represent the class. She approved the settlement, and herein represents only those persons in the class who approve the settlement.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is officially reported at 667 F.2d 1204, and appears herein as Appendix A. The original opinion rendered by the District Court for the Northern District of Texas, Fort Worth Division, which is unreported, is reproduced herein as Appendix B. The District Court's order amending its original opinion, which is also unreported, is reproduced herein as Appendix C.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISION INVOLVED

Fed.R.Civ.P. 23(a) (4), 28 U.S.C.:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if ... (4) the representative parties will fairly and adequately protect the interests of the class.

## STATEMENT OF THE CASE

### A. Proceedings Below:

On March 5, 1975, Petitioners Sarah Linda Parker and Curtis Ford filed a class action suit against Bell Helicopter Company, a division of Textron, Inc., and certain unions, alleging discrimination in employment against blacks and females, in violation of Title

VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. 1981. Between 1975 and 1979, six other lawsuits were brought alleging identical discrimination by Bell Helicopter Co. These seven suits were eventually consolidated into the instant proceeding.[3]

Following consolidation, dissension arose among the class attorneys regarding who would assume the duties of lead class counsel, and therefore be entitled to the lion's portion of any fee award. Since no agreement was reached, the district court appoined Howard Spencer as lead counsel and Huey Mitchell and James Barber as associate class counsel, assigning them duties concommitant with such positions. On April 21, 1978, the district court conditionally certified the litigation as a class action under Rule 23 (b) (2) of the Federal Rules of Civil Proceedure. Extensive, reciprocal discovery on the merits began in October 1978 and continued until February 1980. Time records of Plaintiffs' attorneys indicate that discovery on behalf of the class was conducted almost exclusively by Mr. Specter's law firm.

Trial was scheduled for March 3, 1980. On February 29, 1980, negotiations between Mr. Specter and counsel for Bell Helicopter concluded in their reaching a comprehensive settlement agreement. On the basis of this agreement, a joint motion for continuance was submitted to the district court. The district court granted this motion, instructing counsel to advise the court on or before April 1, 1980 whether the agreement could be completed.

On March 28, 1980, Mr. Specter and other class counsel formally signed and approved a "Proposed Stipulation of Compromise and Settlement" (hereafter, "Proposed Settlement"). In general terms, the Proposed Settlement provided for the resolution of all claims held by members of the absentee class. However, the

[3]Subsequently, the claims against the unions were severed, and at this time are pending in the district court.

Proposed Settlement also severed all of the individual claims of Ms. Parker and the other class representatives, which claims are still pending before the district court.

On October 16-18, 1980, the district court conducted a settlement hearing on matters relating to the nature of the settlement negotiations, the adequacy of the Proposed Settlement and the amount of attorney's fees. On March 10, 1981, the district court issued a Memorandum Opinion and Order awarding fees to class counsel and approving the Proposed Settlement. Judgment was initially entered on March 31, 1981, but was later withdrawn in order that the district court could amend its original opinion to increase the award of attorney's fees and correct clerical mistakes. A final judgement was thereafter entered on April 10, 1981.

On May 8, 1981, Petitioners filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals heard oral argument on August 24, 1981, and on February 18, 1982 rendered an opinion affirming the judgement of the district court.[4]

**B. Statement of Facts:**

On the eve of trial, Mr. Specter and attorneys for Bell Helicopter began negotiations which led to the settlement agreement of February 29, 1980. This agreement was sufficiently explicit and comprehensive that only certain details remained in order to implement and incorporate it into a final settlement document. Mr. Specter was the only class attorney who participated in negotiating the settlement.

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[4]Huey Mitchell also filed an appeal alleging the district court failed to award him sufficient attorney's fees. The Court of Appeals upheld the district court's award. Thereafter Mr. Mitchell filed a suggestion for rehearing en banc, which was denied on March 15, 1982.

This settlement agreement was negotiated by Mr. Specter without consulting any of the class representatives. He did not advise the representatives that settlement was being contemplated. He did not advise any representative of the terms being negotiated before the agreement was reached. No class representative had any input into the settlement, and Mr. Specter did not give the representatives any opportunity to propose the terms of relief which were of most priority or benefit to the class. After February 29, 1980, the terms of this settlement were released to the representatives through their respective class attorneys.[5]

Since the other associate class counsel had not conducted and analyzed the voluminous discovery obtained in this case nor participated in any of the settlement negotiations, the class representatives waited for Mr. Specter to call a meeting to discuss the settlement. When no communication was forthcoming from Mr. Specter, the representatives themselves called a meeting for March 26, 1980.

At this meeting, one of the representatives brought a letter he had just received from Mr. Specter. In this letter, Mr. Specter attempted to justify the settlement solely on the basis of the Defendant's statistics, together with his bare conclusion that the class had a weak case. After reviewing and discussing the terms of settlement and the meager evaluation presented in Mr. Specter's letter, the representatives voted unanimously to reject the settlement agreement as providing inadequate relief to members of the class. This message was conveyed to one of the associate class attorneys who came late to the meeting.

Two days later, on March 28, 1980, without any notice or warning to the representatives, Mr. Specter and the other class counsel

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[5]Mr. Specter and local counsel Wallace Craig originally represented Plaintiffs Ernest Mackey and Albert Odom. Attorney James Barber originally represented Plaintiff Dorothy Spears. The remaining eight Plaintiffs were represented by Huey Mitchell.

formally signed and approved the Proposed Settlement. However, before doing so, Mr. Specter also agreed to the inclusion of a major, additional settlement provision. This additional term critically impaired the effectiveness of all affirmative relief contained in the settlement. By such provision, the Defendant's obligation to provide class-wide affirmative relief was limited to a period of only four years. Mr. Specter made no attempt even to contact the representatives before including this devastating term in the settlement.

After Mr. Specter had formally signed and approved the Proposed Settlement, the representatives also learned for the first time that he had simultaneously negotiated matters involving class relief and payment of his own attorney's fees, and that he had created a conflict of interest by establishing one settlement fund to compensate both the class and the class attorneys.

Only after the Proposed Settlement was formally approved did Mr. Specter consent to meet with the representatives. At this meeting on April 8, 1980, the representatives again voiced their opposition to the settlement because of the inadequate relief provided to the class. They also openly expressed their anger with Mr. Specter's shabby and suspicious representation of the class during the settlement. Mr. Specter now offered to meet with the representatives individually. However, since the settlement was already signed and sealed, the representatives rejected this belated and sanctimonious show of generosity.

On April 18, 1980, Mr. Specter filed the Proposed Settlement. At this time, Mr. Specter also misrepresented to the district court that all of the representatives approved the agreement, despite Mr. Specter's obvious knowledge of their strong opposition just ten days before. Thereafter, the district court granted the motions of ten of the eleven class representatives dismissing Mr. Specter and the other associate counsel as class attorneys.

## REASONS FOR THE WRIT

### I.

### The Petition Raises Substantial and Vital Issues Concerning The Prevention of Actual And Potential Abuse Of The Class Action Device

As negotiated by Mr. Specter, the Proposed Settlement creates one fund of money serving two purposes: To compensate the class and to pay attorney's fees. By such action, Mr. Specter and other class counsel have acquired a substantial, pecuniary interest in the monetary benefits established to reimburse the class. Such conflict of interest specifically violates the American Bar Association Code of Professional Responsibility. As provided by the ABA Code in Disciplinary Rule 5-103(A): "[A]n attorney shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client."

The evil that festers in such situations is two fold: First, by such procedure, class attorneys are given the incentive to negotiate a settlement fund large enough to pay their own attorney's fees, without the further incentive to assure that the remainder of the settlement fund is adequate to protect the class. With permission to acquire a proprietary interest in the settlement fund, the class attorneys will not so zealously assure that the level of the fund, beyond the amount necessary to pay their fees, is sufficient to compensate the class. Class attorneys often expend substantial time and incur great expense in the development of class litigation.[6] Facing the greater need to protect this immense investment of time and money, class attorneys must not be given the incentive to secure their own financial rewards at the expense of the class.

[6]*See*, Newburg, *Newburg on Class Actions*, (Supp. 1982), pp. 756-788, pp. CS13-47 - CS13-57 (references are to pages within the Supplement).

Secondly, once having negotiated a single fund to compensate the class and to pay attorney's fees, a class attorney can no longer be fully relied on to provide the most ardent and loyal assistance in evaluating the adequacy of the settlement. Once the class attorney has acquired this conflicting, pecuniary interest, neither the class nor the court can be confident of the attorney's continued honest and unbiased judgment when asked to appraise whether the settlement protects the interests of the class.

In passing on this issue, the Court of Appeals radically departs from the entire body of case law on the subject.[7] The Fifth Circuit holds that when the trial judge complies with the applicable procedures for determining the reasonableness of attorney's fees, any review of matters involving an attorney's conduct is limited to whether the trial court abused its discretion in determining the amount of the fee.

It is the Fifth Circuit's conclusion that if the trial court is careful in determining that the *amount* of attorney's fees is reasonable, then such procedure automatically assures that the *manner* by which such fees were negotiated is also reasonable. The Fifth Circuit assumes that if a trial judge protects the class by prudently determining the amount of attorney's fees, he has then *a priori* protected the class from any improper manner by which the fees were negotiated.

The fallacy in this reasoning is self-evident. The most scrupulous review of the amount of attorney's fees will never assure that the manner by which the fees were negotiated will protect the integrity of the settlement process. Insuring the reasonableness of the amount of attorney's fees will never guarantee that a class attorney has ardently and conscientiously bargained for the most adequate compensation for the class once he was certain the settlement fund was large enough to pay his own attorney's fees.

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[7]See pages 9-12, *infra*.

Further, one could never be sure that a class attorney later submitted a modest request for attorney's fees in order to avoid any examination of the earlier manner by which he had negotiated the settlement.

By focussing solely on the amount of the attorney's fees, the Fifth Circuit also fails to curb the other evil inherent in the practice of creating one fund to pay both the class and the class attorneys. That is once an attorney becomes dependent upon the settlement fund for payment of his fees, neither the class nor the court can be certain of his unswerving devotion, trustworthiness and honest judgment when asked to evaluate the adequacy of the settlement.

Both the class and the court rely heavily on the opinion of class counsel regarding this matter.[8] However, a mere finding that the amount of attorney's fees is reasonable will have no power to deter the evil of attorneys giving misleading advice regarding the adequacy of the class relief, in order to assure recovery of their own fees.

Thus, negotiating one settlement fund to pay both the class and the class attorneys creates a clear conflict of interest which destroys the fragile barrier confining the well known potential for abuse inherent in the class action settlement process.

## II.

## There Exists An Irreconcilable Conflict In The Courts of Appeal

Until now it has always been held that a serious, substantial and impermissible conflict of interest occurs when a class attorney negotiates a settlement in which his fees will be payed from the

[8] *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

same fund created to compensate his class. The Courts of Appeals in both the Third and Ninth Circuits have specifically disapproved this practice.

In *Prandini v. National Tea Co.*, 557 F.2d 1015, (3rd Cir. 1977), the Court of Appeals for the Third Circuit was presented with this exact situation in which class attorneys had negotiated a settlement creating one fund to pay both the class and themselves. Addressing the abuse inherent in this arrangement, the Third Circuit specifically required that:

> [T]rial courts insist upon settlement of the damages aspect of the case separately from the award of attorney's fees. *Only after* Court approval of the damages settlement should discussion and negotiation of appropriate compensation for attorneys begin. This would eliminate the situation in this case of having, in practical effect, one fund divided between the attorney and client. 557 F.2d at 1021. (Emphasis added).

Similarly, in *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980, *cert. denied*, 450 U.S. 912 (1980), the Ninth Circuit strongly discouraged the simultaneous negotiation of attorney's fees and substantive class relief. In this case, the Ninth Circuit carved out an exception to the rule prohibiting such simultaneous negotiation. Under this exception, where a disinterested governmental agency participates in the settlement negotations and oversees the interests of the class, the abuse inherent in such simultaneous negotiation of attorney's fees and class relief will be neutralized and the settlement will be upheld.

In *Mendoza*, the United States Department of Justice supervised the settlement negotiations. However, in the instant case, no such governmental agency or any other disinterested third party was present to neutralize the abuse and unethical conduct preci-

pitated by Mr. Specter's simultaneously negotiating one settlement fund to pay both the class and the class attorneys.

Of further importance is that prior to this case, the district courts which have addressed the issue of the simultaneous creation of one settlement fund to pay both the class and the class attorneys, have uniformly disapproved such conduct.[9]

Contrary to decisions of the Third and Ninth Circuits, the Fifth Circuit has established a sweeping new principle which radically departs from the uniform rule precluding class attorneys from creating one settlement fund to pay both themselves and members of the class.

As previously described, the Fifth Circuit's decision permits a class attorney to engage in a conflict of interest which critically impairs his ability to adequately protect the interests of the class. By deciding that the reasonableness of the attorney's fee award legitimates any abuse and unethical conduct in the manner by which such fees were negotiated, the Fifth Circuit simply holds that the end justifies the means. By this decision, the Fifth Circuit writes Due Process out of the law.

As indicated in *Prandini, supra,* in order to avoid any conflict of interest, discussion and negotiation of attorney's fees is most appropriately reserved until *after* court approval of the class settlement. Such arrangement guarantees the continued health of Due Process and insures that class attorneys will devote their best

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[9]*Regaldo v. Johnson*, 79 F.R.D. 44 (E.D.Ill. 1978); *Jamison v. Butcher & Sherrard*, 68 F.R.D. 479 (E.D.Pa. 1975); *Munoz v. Arizona State University*, 80 F.R.D. 670 (D. Ariz. 1978); *Lyon v. State of Arizona*, 80 F.R.D. 665 (D.Ariz. 1978); *Norman v. McKee*, 290 F.Supp. 29 N.D.Cal. 1968), *aff'd on other grounds*, 431 F.2d 769 (9th Cir. 1970).

*See also, Manual for Complex Litigation*, reprinted in 1(Pt.2) J. Moore, *Federal Practice, Manual for Complex Litigation*, Pt. II, §1.46 (1979): "[W]hen counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest."

efforts to adequately protecting the interests of the class without succumbing to the obvious potential for abuse in settling such litigation.

## III.

## The Court of Appeals' Decision Will Cause The Severe and Immediate Erosion In Standards Of Professional Comptence And Responsibility Of Class Attorneys.

"[A] broad consensus has now emerged that a significant problem concerning the quality of a substantial number of lawyer's performances in the trial courts does indeed exist."[10] One can "accept as a working hypothesis that from one-third to one-half of the lawyers who appear in serious cases are not really qualified to render adequate representation."[11]

In class actions, the concept of "adequate representation" is of fundamental importance. This Court has consistently held that where the interests of the absentee parties are not protected during class litigation, the requirements of Due Process will not be satisfied. *Handsberry v. Lee,* 311 U.S. 32 (1940); *Sam Fox Publishing Co. v. United States,* 366 U.S. 683 (1961). This concept has been embodied in Fed.R.Civ.P. 23(a) (4) which requires that "[t]he representative parties will fairly and adequately protect the interests of the class." Thus, in the context of class litigation, "adequate representation" is the touchstone of Due Process.

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[10]Warren E. Burger, *Some Reflections on the Problems of Adequacy of Trial Counsel*, 49 Fordham L. Rev. 1 (1980).

[11]Warren E. Burger, *The Special Skills of Advocacy*, 42 Fordham L. Rev. 227, 234 (1973).

In such litigation, "experience teaches that it is class counsel and not the named parties who direct and manage the litigation." *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3rd Cir. 1973). It is widely acknowledged that the actions of class counsel must be continually scrutinized in all phases of the litigation, including the settlement stage, to ensure that the rights of absentee class members are not abused.[12]

The dangers of attorneys abusing the class action device are well known. As this Court recently observed in *Deposit Guarantee National Bank v. Roper*, 445 U.S. 326, 339 (1980):

> [The] potential for misuse of the class action mechanism is obvious. Its benefits to the class members are often nominal and symbolic with persons other than class members becoming the chief beneficiaries.

At the settlement stage, the potential for abuse by class attorneys is omnipresent. At this stage, there is always the temptation for class attorneys to recommend settlement on terms less favorable to their clients because a large fee is part of the bargain.[13] For such reasons, class attorneys are held to higher standards of professional competence and responsibility, since they serve in a position of "public trust" with fiduciary obligations to those not before the court.[14]

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[12] *In re General Motors Corp. Interchange Litigation*, 594 F.2d 1106, 1124 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979); *North American Acceptance Corp. Securities v. Arnall, Golden & Gregory*, 593 F.2d 642, 645 (5th Cir. 1979), *cert. denied*, 444 U.S. 956 (1979).

[13] *Developments in the Law - Class Actions*, 89 Harv. L. Rev. 1318, 1552 (1976); *Graybeal v. American Savings & Loan Ass'n.*, 59 F.R.D. 7.13 (D.D.C. 1973).

[14] *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973), *cert. denied*, 414 U.S. 1092 (1973); *Greenfield v. Villager Industries, supra*, 483 F.2d 824, 832 (3rd Cir. 1973).

To outline the nature and quality of Mr. Specter's representation during the settlement of the instant case, first he totally failed to advise the class representatives of the terms being discussed in settlement of the litigation. Second, he failed to notify any of the representatives that settlement was even being discussed until just before reaching agreement with the Defendant. Third, he reached a settlement agreement with the Defendant without permitting the representatives any chance to recommend the relief which was of highest priority and most benefit to the class. Fourth, he failed to properly assist the representatives in evaluating the reasons for settlement or the merits and effect of the terms of relief. Fifth, he then fraudulently concealed his agreement to include a new and critical provision in the final settlement document. Sixth, without notice to the representatives he formally approved the settlement over their objections. Finally, he misrepresented to and concealed from the district court the overwhelming opposition to the settlement at the time it was filed.[15]

In the instant case, before the February 29, 1980 settlement agreement was reached, Mr. Specter wholly failed to advise the representatives of the terms being negotiated on behalf of the class. Such conduct is alone a breach of ethics and a violation of the fiduciary duties owed to the class.[16] Over a century ago, this Court announced that "it is the duty of an attorney to advise the client

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[15]This portrait of Mr. Specter's conduct during the settlement must also include the fact that he caused a conflict of interest in the manner by which he negotiated payment of his attorney's fees, as previously discussed herein.

[16]The violation of an attorney's duty to inform and advise his clients is tortious, *Spector v. Mermelstein*, 316 F.Supp. 30 (S.D.N.Y. 1972), *modified* 485 F.2d 474 (2d Cir. 1973); *Transcontinental Ins. Co. v. Faler*, 513 P.2d 864 (Wash.App. 1973); *Passanante v. Yormark*, 350 A.2d 497 (N.J.Super. A.D. 1975); *Mageary v. Hoyt*, 369 P.2d 662 (Ariz. 1962); and has often been grounds for severe disciplinary action. *In re Estes*, 212 N.W.2d 903 (Mich.1973); *People v. Forsyth*, 543 P.2d 1210 (Colo. 1975); *The Florida State Bar v. Bratton*, 389 So.2d 637 (Fla. 1980); *North Carolina State Bar v. Combs*, 261 S.E.2d 207 (N.Car. 1980).

promptly whenever he has any information to give which the client should receive." *Baker v. Humphrey,* 101 U.S. 494, 499 (1880).

Similarly, at no time before the settlement was approved did Mr. Specter provide the representatives any opportunity to propose the terms of affirmative relief most desired by and of greatest benefit to the class.[17] The importance of such input is undeniable. Unless the relief sought during the settlement can be considered what would be desired by the absentee members of the class, it would be a violation of due process to impose this settlement as a binding judgment against them. *See Hansberry v. Lee, supra,* 311 U.S. at 38-40.

Further, once the February 29, 1980 agreement was reached, Mr. Specter failed to properly assist the class representatives in evaluating the settlement. Mr. Specter totally deprived the representatives of adequate information by which they could determine the reasons for pursuing settlement, appraise the strengths and weaknesses of the case, measure the risks of establishing liability and damages, and gauge the merits and effect of the settlement terms.

Mr. Specter never met with the representatives to assist in evaluating these matters before he formally signed and approved the settlement on March 28, 1980. Instead, he sent one letter addressed to two representatives, in an attempt to justify the settlement. However, the information he provided in the letter was useless as a basis for making an informed and intelligent evaluation.

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[17] Affirmative relief is of particular importance in Title VII class litigation. This Court has repeatedly emphasized that the object of Congress in enacting Title VII was to achieve equal employment opporunities and to eliminate those discriminatory practices which have fostered radically stratified job enfironments to the disadvantage of minorities. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

(continued)

In this letter, the only objective information provided by Mr. Specter as a basis for settlement were certain statistics compiled by the *Defendant.*[18] Mr. Specter made no effort to discuss the nature and strength of *Plaintiffs'* statistical or non-statistical evidence. Thus, the representatives had no basis on which to make an informed and careful judgment regarding the strength of the case and the potential success in establishing liability and damages. Neither did this letter include any information which permitted an

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For example, the following basic and fundamental provisions of affirmative relief are completely missing in the settlement negotiated by Mr. Specter: (1) There are no hiring goals or preferences for Black or Female applicants; (2) There are no promotional goals or job preferences for Black or Female employees; (3) There are no training programs created for minority applicants or employees; (4) There is no requirement that Defendant obtain and implement an independent validation of the selection criteria used as the basis for its hiring and promotional decisions; and (5) There is no requirement that job openings be posted.

Instead, the affirmative relief provisions actually contained in the settlement in thsi case are self-serving (e.g., Defendant acknowledges its commitment to equal employment); presently in existence (e.g., Defendant agrees to retain employment applications for at least one year, when it already does so; Defendant agrees to create the position of Equal Opportunity Counselor, when it already has employees with similar job titles and functions; Defendant agrees to establish a procedure for educating supervisors about equal employment obligations, when it already has such a program in existence); totally unenforceable (e.g., Defendant agrees to employ only "properly trained and qualified" recruiters); or frought with loopholes (e.g., Defendant agrees to maintain a list of certain available positions, but doesn't agree to post the list anywhere or show it to anyone; Defendant agrees to evaluate its supervisors' "contributions" to equal employment, but doesn't agree to take any corrective action if the "contribution" is unsatisfactory; Defendant agrees to require written reasons when a minority is rejected for employment or promotion, but doesn't agree to show the reasons to the affected person or to take any corrective action if the rejection is unlawful). Each of the other few settlement provisions negotiated by Mr. Specter are riddled with the same infirmities.

[18]It perhaps goes without saying that if all plaintiffs were compelled to rely soley on the defendant's view of the evidence when deciding whether a settlement offer was justified, there would hardly be any reason to file suit.

objective appraisal of the merits or effect of the terms of relief.[19]

It can not be emphasized too strongly that "adequate representation" at this stage of the litigation requires class counsel to provide the representatives with basic information about the reasons for settlement and the merits and effect of the terms of class relief.[20] Without adequate assistance and information from their own counsel, laymen can not be expected to protect their rights when dealing with practiced and carefully counselled adversaries. *See, Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 8 (1964).

Further, on March 28, 1980, in a shocking and outrageous breach of ethics, Mr. Specter formally agreed to include in the settlement a crucial, new provision without disclosing this term to the

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[19]As further example of the ineffective assistance provided by Mr. Specter, at no time prior to his formally approving the settlement did he ever advise the representatives of the amount of the attorney's fees which were to be deducted from the settlement fund created to compensate the class. Through such neglect and indifference, the representatives were never given the opportunity to determine how much money the class was actually to receive after the class attorneys took their fees off the top of the settlement fund. Thus, the representatives were also deprived by class counsel of any ability even to begin to evaluate the adequacy of the monetary relief provided by the settlement.

Six month later, Mr. Specter and other class counsel finally revealed to the district court the amount of their fee request. Collectively, their petitions amounted to a request for over $704,000. Since the amount in the settlement fund at the time the petitions were submitted was approximately $1,366,000, Mr. Specter and other class counsel were soliciting more than 51% of the settlement fund for themselves. As if this were not enough, Mr. Specter later petitioned for additional fees and expenses in excess of $45,000, to be added to his original request of more than $496,000.

[20]"Unless one is a Title VII Specialist armed with previous experience in drafting and implementing consent decrees, it is very difficult to tell whether any one decree is 'good,' that is, whether it has satisfied to the fullest extent possible Title VII objectives of eradicating employment discrimination and making 'whole' each employee who has suffered discrimination." *Title VII Consent Decrees: Affirmative Inaction?* 18 Santa Clara L. Rev. 517, 518 (1978).

representatives before he signed the settlement agreement. Simply put, this is fraud. Moreover, the result of this new provision was to limit the Defendant's obligation to provide affirmative relief to a period of only four years. Thus, by such unprincipled action, Mr. Specter cut the heart out of any lasting effectiveness the settlement might provide to members of the class.

The Fifth Circuit says that Mr. Specter gave "uncontroverted testimony" that he was not aware of the four year term until the day that he signed the final agreement on March 28, 1980, and thus, his failure to inform the representatives of this new term can not constitute misrepresentation.

Unfortunately, the Fifth Circuit's reasoning is both fallacious and unfounded. The Fifth Circuit is correct in saying that no misrepresentation occurred during the time that Mr. Specter did not know of the new term to be included. Yet, while this is obvious, it begs the question. The fraud committed by Mr. Specter is that once he knew of this critical term, he agreed to include it in the settlement without first notifying and discussing such action with the representatives. Further, it is more remarkable that the Fifth Circuit seek to base this reasoning on the "uncontroverted testimony" of Mr. Specter, since it is a cold, hard fact, readily observable from the briefest inspection of the record that Mr. Specter did not testify, nor was he sworn to testify, at the settlement hearing about anything except attorney's fees.

By engaging in such fraudulent conduct, Mr. Specter not only breached his fiduciary obligations to the class, but also undermined the integrity of the settlement process. The integrity of this process depends upon an attorney's duty to assure that his conduct is of the utmost good faith, consistent with the most scrupulous standards of professionaly competence and responsibility.[21] Per-

[21] *See, Miller v. Republic Nat. Life Ins. Co.*, 559 F.2d 426 (5th Cir. 1977); *Flinn v. FMC Corp., supra*, 528 F.2d at 1173.

mitting such conduct demonstrated by Mr. Specter is unthinkable, and will only serve to reduce the quality of representation in federal courts already believed by many judges to be at a critical level.[22]

However, this was not the only fraudulent act that Mr. Specter committed during the settlement process. Regrettably, on April 18, 1980, Mr. Specter specifically, and in writing, misrepresented to the district court that the Plaintiffs were desirous of compromising the litigation on the terms contained in the settlement.[23] Nothing could have been further from the truth. The Plaintiffs' tremendous opposition was brought home to Mr. Specter only ten days earlier, when on April 8, 1980, they told Mr. Specter in no uncertain terms that as representatives of the class they were opposed to the settlement, just as they had earlier expressed their unanimous opposi-

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[22] *See,* Warren E. Burger, *Some Reflections on the Problem of Adequacy of Trial Counsel, supra*, 49 Fordham L. Rev. at 9; A. Patridge & G. Bermant, *The Quality of Advocacy in the Federal Courts* 16 (1978); Maddi, *Trial Advocacy Competence: The Judicial Perspective,* 1978 Am. B. Foundation Research J. 105.

[23] On April 18, 1980, Mr. Specter submitted to the district court a Joint Motion for Preliminary Approval of Compromise and Settlement, in which it is clearly stated:

> "Based upon the foregoing analyses, the parties to this Motion embarked upon and concluded comprehensive settlement discussions and executed this Stipulation of Compromise and Settlement which is annexed hereto as 'Exhibit A.' *Plaintiffs* and their attorneys believe that settlement of their litigation with Defendent employer on the terms and conditions set forth in Exhibit A is and would be in the best interests of members of the Class and that the settlement embodied therein is fair, reasonable and adequate." (Emphasis added).

The district court responded in its opinion by saying that "it would be a gross distortion of the events to suggest that counsel attempted to conceal or even delay notifying the court of the plaintiff-objectors dissent once it became irreconcilable." However, the district court gave no support for this statement. It did not cite any evidence to justify this bare conclusion, and in fact no other evidence, except Mr. Specter's misrepresentation, was introduced on this matter at the settlement hearing.

tion to the settlement on March 26, 1980.[24]

The foregoing portrait of Mr. Specter's conduct in negotiating this settlement presents an insidious picture of unethical and incompetent representation of the class. The serious problem of poor representation in the federal courts will be severly aggravated by a precedent upholding the irresponsible actions he committed during the settlement process in this case. By his actions, Mr. Specter has violated the integrity of the class settlement process and victimized the members of the class. This case presents an appropriate vehicle for reinforcing the standards of professional competence and responsibility of lawyers conducting such major litigation in the federal courts. A precedent permitting class attorneys to provide the kind of feeble and inadequate representation demonstrated by Mr. Specter will stand *Handsberry* on its head, thereby establishing the new precedent that absentee class members may be bound by a judgment in the absence of due process.

## IV

## The Courts Below Applied An Improper Legal Standard

In the instant case, the basic premise of Petitioners' argument is that given the extremely high potential for abuse in the settlement of class action litigation, unless class counsel adequately protect the interests of the class during a settlement, the integrity of the settlement can not be assured, and the class members can not be bound by it. *See, Handsberry v. Lee, supra.* As a foundation for this argument, Petitioners presented to both the District Court and the Court of Appeals the same glaring portrait of Mr. Specter's

[24]The initial objections of the ten class representatives were echoed by a substantial percentage of the class. 20-23% of the absentee class in the Fort Worth area filed objections to the settlement. This figure was acknowledged as "significant if not overwhelming" by the district court. *See, Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 831 (9th Cir. 1976).

inadequate representation during the settlement of this case, as has been rendered to this Court.

As representatives of the class, Petitioners had, and continue to have, a clear, statutorily imposed duty to vigorously represent the interests of the class. *Cohen v. Beneficial Loan Corp.*, 377 U.S. 541, 549-50 (1949); Fed.R.Civ.P.23(a)(4). Given the flagrant conduct exhibited by Mr. Specter during the settlement of this case, Petitioners would certainly have breached their own duties to the class had they failed to present strong objection to the manner by which Mr. Specter had negotiated this settlement. The fact that Mr. Specter abdicated and abondoned his own fiduciary obligations to the class at such a crucial time made it even more imperative that the Petitioners undertake the necessary steps to protect the class.

However, as a basis for its approval of the settlement, the district court chose to impugn the Petitioners' motives for opposing the settlement. As stated by the district court,

> Plaintiff-Objectors opposed the settlement in bad faith, primarily to gain leverage in settling their individual claims against Bell Helicopter at exorbitant figures. Although there were obvious differences of degree among Plaintiff-Objectors, their opposition to the settlement was a product of disappointment and greed, rather than dispassionate evaluation of the settlement against the risks and expense of pressing on with the litigation.

This statement is as utterly erroneous as it is shocking.[25] First, the district court says that Petitioners desired to settle their claims at "exorbitant figures." However, at the settlement hearing, the district court explicitly refused to hear any evidence regarding the validity or extent of Petitioners' individual claims for relief. The district court specifically indicated that such claims had been severed from the settlement at hand, and were not at issue. Only

[25]The Court of Appeals repeats this statement in its own opinion.

evidence relating to the settlement negotiations and the adequacy of class relief was permitted by the district court. Yet, despite this ruling and in the absence of evidence on this issue, the district court reached the arbitrary conclusion that Petitioners attempted to settle their claims at "exorbitant figures." Such unsupported reasoning is a serious misuse of the district court's powers.[26]

Second, the district court says that Petitioners' opposition was motivated by an attempt to gain leverage in settling their own claims. However, as the district court had recognized, the individual claims had been *severed*. Such claims were not part of the settlement. Petitioners' own claims would stand or fall apart from class. Petitioners had no leverage to exercise, since they could neither gain nor lose by the outcome of the settlement. Even if the settlement were rejected by the district court, Petitioners' claims could just as easily be severed in another settlement, if Respondent Bell Helicopter even chose to negotiate one. Thus, the district court's reasoning is wholly illogical.

Third, the district court says that Petitioners' objections were based on greed. However, again, the Petitioners' claims had been severed. No greed could have existed in opposing the settlement, since no possible advantage or benefit could have been gained by the Petitioners in raising their objections. Ironically, only by "approving" the settlement would the Petitioners have stood to gain. By approving the settlement, they could have proceeded to trial on their individual claims without delay; they could have

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[26]At least one other misuse of the evidence by the district court is of importance to this case. In upholding the settlement, the district court stated that all of the eleven Plaintiffs consulted with their attorneys authorized their attorneys "to convey binding settlement offers to defendent Bell and to approve the class settlement on their behalf if accepted." It is true that each of the plaintiffs were requested to and did make a settlement offer for his or her individual claims. However, nowhere, at absolutely no place in the record, is there testimony that each of the class representative specifically authorized settlement for the class if their own settllement offers were accepted. Such evidence does not exist, anywhere. Nor is there evidence anywhere, or at any place in the record that more than two class representatives ever approved the settlement at any one time.

unshouldered the continuing burden of vigilantly representing the interests of the class; and they would not have had to fund the appeal to the United States Court of Appeals, or the petition for certiorari herein filed with this Court.

The district court is at least partly correct in saying that Petitioner's opposition was based on disappointment. As a matter of fact, the Petitioners were much more than disappointed. They were and still are seriously concerned with the irresponsible and fraudulent conduct exhibited by Mr. Specter during the course of the settlement negotiations. Given Mr. Specter's most suspicious actions during the settlement (i.e., negotiating a settment without advising the Plaintiffs of the settlement terms, without permitting the Plaintiffs the opportunity to propose the relief most desired by the class, without advising the Plaintiffs that settlement was even being negotiated; by depriving the Plaintiffs of information by which they could properly evaluate the need for and merits of the settlement; by fraudulently agreeing to a critical, new settlement term without any notice to the Plaintiffs; and by misrepresenting the Plaintiffs' opposition at the time the settlement was filed with the district court), the Petitioners followed a most logical course. They pursued their objections to the settlement, to find out what, in blazes, was going on.

Thus, the district court's conclusion regarding Petitioners' motivation for opposing the settlement in this case is both unfounded and unwarranted. Certainly when the integrity of a class settlement is destroyed by the misconduct of the class attorneys, the settlement is no less objectionable or invalid whatever Plaintiffs' motives are for opposing it.

## CONCLUSION

For the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals in this case.

Respectfully submitted,

By: _____

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